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No. 80-579

In The

Supreme Court of the United States

October Term, 1980

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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The respondent, STATE OF MONTANA, respectfully requests this Court to deny the petition for writ of certiorari seeking review of the order of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Cardens, the Petitioners, were charged with nineteen felony counts in State court by an information filed on December 20, 1974. On May 11, 1976, prior to trial, they moved the State District Court for an order to dismiss the information for a lack of speedy trial, which was granted on July 28, 1976. Upon appeal to the Montana Supreme Court, the District Court was reversed and the case remanded for trial. A petition for rehearing was denied. Cardens thereupon applied to the Federal District Court for the District of Montana for a writ of habeas corpus along with a motion for a stay of the State court proceedings, which was granted. Subsequently, on September 27, 1977 the Petitioners filed discovery motions to expand the record. Oral argument was heard on the application for the writ on October 28, 1977 and briefs were filed on November 18 and 23, 1977 by the State and the Petitioners. On January 3, 1978 the District Court granted the discovery motions, and on May 12, 1978 granted the writ which enjoined the State from proceeding any further in the criminal prosecution of the Petitioners.

In their petition for a writ of habeas corpus, Cardens alleged that they had exhausted all of their remedies available in the State courts. In its answer, the State of Montana responded:

> "Respondents admit that the Petitioners have exhausted their remedies available in the State Court as to the period of time from the filing of the information untii the Motion to Dismiss for lack of speedy trial was made on May 11, 1976, but deny that the Petitioners have exhausted their remedies for any period of time thereafter;"

The Petitioners have not demanded a speedy trial.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

I.

Question No. 2 Asserted By Petitioners Does Not Present A Substantial Federal Question Which Has Not Heretofore Been Decided By This Court

Question number 2 posed by the Petitioners was answered by this Court in *Fay v. Noia,* 372 U. S. 391 (1963). It is clear that the exhaustion requirement in habeas corpus proceedings arising from state court prosecutions is a matter of comity and not jurisdiction.

II.

Questions No. 1, 3, and 4 Asserted By Petitioners, Although Raised Below, Are Not Presented By The Facts of Record

The Petitioners contend that in the District Court proceedings the State of Montana admitted that the Petitioners had exhausted their state court remedies and therefore waived its right to challenge the petition on that ground. The State has waived nothing. In its original answer to the petition for a writ of habeas corpus, which is quoted above, it is clear that the State maintained that the Petitioner's had not exhausted all of their state court remedies. Additionally, the Federal District Court, in its initial order, directed the Attorney General of the State of Montana to answer the petition, and specifically directed the Attorney General to address the question of exhaustion of state remedies (C.T., at p. 37). At that time, there was no further state remedy available to the Petitioners for

the period of time covered by their original motion to dismiss for lack of a speedy trial. They would have had to wait until the trial itself to renew the motion. The only concession by the State as to the exhaustion of remedies was for a limited period of time, between the filing of the information and the motion to dismiss for lack of speedy trial.

Exhaustion of remedies for that limited period of time does not equate with the exhaustion of remedies requirement of either 28 U. S. C. section 2241 or 28 U. S. C. section 2254. Total exhaustion of all state court remedies is a condition precedent to Federal intervention pursuant to these sections, and the Cardens have not exhausted all of their state court remedies.

Petitioners represent in Question number 4 that the issue of exhaustion was never raised by the State of Montana in the District Court proceedings and that, as a consequence, the Court of Appeals should not have decided the appeal before it on that issue. The District Court, however, clearly perceived that the State was arguing exhaustion and abstention in its Memorandum and Order (C.T., at p. 313-314). *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973), *Moore v. DeYoung,* 515 F. 2d 437 (3d Cir., 1975), and *Younger v. Harris,* 401 U. S. 37 (1971), all of which focus upon exhaustion and abstention, were all cited in the initial brief of the State of Montana in opposition to the petition for writ of habeas corpus (C.T., at p. 125). Additionally, the brief of the State in support of its motion to amend the findings of fact and judgment (C.T., at p. 329) directly addressed the question:

> We had no choice but to concede that for the "period of time in question", that period that had been litigated

> by the state district court, there was no further state remedy. But, consistent with *McDonald,* supra, the petitioner had not exhausted his state remedies, for the same motion was still available at the trial level and on appeal. We made this argument in our brief with respect to Stay of Proceedings, and in light of *McDonald,* supra, that argument goes to the heart of exhaustion of remedies. The issue is not was the defendant denied a speedy trial, for a specific period of time, the issue is whether or not he has been denied a speedy trial, and that issue cannot be determined until he has had his trial, and then exhausted state remedies. (C.T., at pp. 330-331)

Likewise, Specification No. 5 of the State's motion to amend findings and judgment (C.T., at p. 232) states:

> 5.) That the Court erred in finding that the petitioners' remedies were exhausted at the state level; that the court should have found that the petitioners' remedies were not exhausted at the state level until there had been a final judgment in the state court.

Questions 1 and 4 asserted by Petitioners are not properly presented by the facts of record. Those facts reveal that the issue of exhaustion of remedies was not waived. It was clearly presented to the Federal District Court by the State of Montana and was not raised for the first time on appeal.

Question number 3 is premised on Petitioners' misunderstanding of speedy trial remedies still available in the State courts. The Petitioners contend that they have exhausted their state court remedies. Their argument is that when the Montana Supreme Court denied their motion to dismiss for failure to grant a speedy trial, and then denied a petition for rehearing, there was no other available procedure by which they could raise the question pre-

sented. Therefore, the Petitioners maintain, State court remedies were exhausted prior to bringing the issue to the Federal courts. The Petitioners do, however, have other remedies available to them. They can still assert a speedy trial defense when, and if, they are brought to trial and upon appeal in the State courts. *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973). As this Court pointed out in *United States v. McDonald,* 435 U. S. 850 (1978), a speedy trial claim is best reviewed after trial when the court's dismissal is more conclusive and allegations of prejudice are less speculative.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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